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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY JAMES FRAUSTO, Defendant and Appellant.	H032535 (Santa Clara County Super. Ct. No. FF512940)

The Santa Clara County District Attorney filed a first amended information on April 16, 2007, in which appellant was charged with the murder of Luis Bautista Santos. (Pen. Code, § 187.)[1] The information alleged that during the commission of the charged offense, appellant personally and intentionally discharged a firearm proximately causing death; personally used a handgun; and committed the offense for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further, and assist criminal conduct by gang members. (§§ 12022.53, subd. (d), 12022.5, subd. (a), 186.22, subd. (b)(1)(C).)[2]

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[1] The information, verdict forms and the prosecutor during trial identified the decedent as Luis Santos Bautista. However, at trial his brother identified him as Luis Bautista Santos, which is consistent with the death certificate. Accordingly, we refer to him as Luis Bautista Santos or Santos.

[2] All unspecified section references are to the Penal Code.

On May 1, 2007, a jury found appellant guilty of first degree murder and found the arming and gang allegations to be true. On January 18, 2008, the court sentenced appellant to a total prison term of 50 years to life consisting of 25 years to life on the murder count, with a consecutive term of 25 years to life for discharging a firearm proximately causing death. (§12022.53, subd. (d).) The court struck the punishment for the gang enhancement.

Appellant filed a timely notice of appeal on January 22, 2008.

On appeal, appellant raises six issues. First, he contends that the trial court erred in admitting statements he made before he was given *Miranda* advisements.[3] Second, there was insufficient evidence to support a finding of deliberate and premeditated murder. Third, there was insufficient evidence to support the gang enhancement. Fourth, the imposition of two consecutive 25 to life terms is unconstitutionally cruel and unusual punishment. Fifth, the trial court erred in instructing the jury on first degree premeditated murder because the information charged only second degree malice murder. Finally, the trial court erred in calculating his presentence custody credits.

The Attorney General concedes that appellant is entitled to more presentence custody credits. We agree and will correct the error. However, we disagree with all appellant's other contentions and affirm the judgment.

Facts and Proceedings Below

The Prosecution Case

On September 30, 2005, around 9 p.m., Santa Clara County Deputy Sheriff Michael Paresa Sr. was driving out of the parking lot at Tennant Station when he saw a white truck pass him on the left.[4] Deputy Paresa saw four or five people get out of the truck and then one reach in and grab what appeared to be the handle of a broom. In

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

[4] At the time of trial, Deputy Paresa had been working in law enforcement for 23 years including working for the Federal Bureau of Investigation.

addition to the group that got out of the truck, Deputy Paresa saw a group of six or eight people walking towards him. This group (hereafter the larger group) continued to walk about 30 feet towards the people from the truck. The group from the truck walked towards the larger group. Both groups stopped when they were about 10 feet apart.

From his vantage point, which was about 91 feet away, Deputy Paresa saw the two groups gesturing with their hands at about waist level. Deputy Paresa could see hands gesturing only part of the time because the group from the truck had their backs towards him. The deputy did not see any of the people from the truck move forward, extend an arm forward, or raise their hands above their body. People in both groups were gesturing and talking to each other for about 30 seconds, but Deputy Paresa could not hear what was being said. The deputy knew that the groups were going to fight. Deputy Paresa did not think that the altercation was gang related at the time because he was aware that there was a bar nearby that spawned a lot of fights in the area.

Deputy Paresa saw a muzzle flash come from the larger group. He heard a loud bang followed by four more bangs. The bangs occurred over three to four seconds. The deputy testified that he thought both groups seemed "surprised by the action" except the "shooter" who was positioned in the middle of the larger group. Deputy Paresa was too far away to be able to identify the shooter, other than to see that he was wearing dark clothing. Deputy Paresa was positive that there was no physical contact between the groups before the gunfire.

After the gunfire, the groups separated and retreated. The group from the truck returned to their vehicle, but one male from this group fell to his knees and hunched over. Deputy Paresa saw two of his friends pick him up, drag him to the pickup and place him in the cab.

The victim, later identified as Luis Bautista Santos, died from his gunshot wounds. Police located a .357 caliber round in the area where the shooting occurred.

Michael Paresa Jr. was with his father on the night of the shooting. When asked what he remembered with any certainty about what he saw as the two groups approached each other, he testified that there was "some . . . trash talking going on," but he could not hear what was said because the car window was up. Michael thought the talking went on for no more than 10 seconds and the groups were five to 10 feet apart. Michael was certain that he heard five shots. Michael was not completely sure, however, whether he saw any pushing and shoving between the groups.[5] Michael could not see the person who fired the gun, nor was he able to determine the color of the clothing that was being worn by either group.

On the night of the shooting, 17-year-old Mario Flores was with his friend Santos. Flores had known Santos for two years. After leaving Mountain Mikes Pizza, they were in a pick-up truck with three others when Flores saw "the other kind," referring to a group of Norteños.[6] At the time, Flores was wearing a blue-striped shirt and Santos was wearing a plain white shirt. Flores thought that Santos might have been wearing a belt with the number 13 on it. Flores described Santos as an associate of their Sureño group.

According to Flores, they stopped and got out of the pick-up. The Norteños approached them. Flores explained, "We were just going to defend ourselves." Flores did not see anyone in his group grab a broomstick or display a weapon. He did not see anyone among the Norteños with a weapon.

When the two groups were about 45 feet apart, words were exchanged that Flores described as "gang stuff" such as "Norte" or "Sur." According to Flores, the verbal exchange happened very quickly and then "just gunshots," which he estimated to be four in number. Flores did not see who had the gun, but told the police that the shooter was wearing a red shirt. Before the shots were fired, none of the Sureños displayed a weapon,

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[5] One week earlier, Michael had told Detective Beilmann that there was pushing and shoving between the groups before the shooting.

[6] Flores would not say to whom the pick-up belonged or who was driving.

but Flores pulled a pocketknife out after everyone had scattered. After the shooting, Flores fled in the direction of the Safeway store and reached the loading dock. As he looked back he saw Santos on the ground.

Kelly Connor, a Morgan Hill High School student, knew appellant through her boyfriend Evan Mensing. One night in September 2005, she was at a football game with friends when she received a phone call from Evan.[7] Connor, along with two friends, drove to Tennant Station to meet Evan. When she arrived in the area behind Safeway, Connor noticed the street was blocked, there was yellow tape, and there were police officers in the area. Conner picked up Evan, his younger brother Alex and a Hispanic male. They went to the Mensing residence, which was about four or five minutes away.

Once they arrived at the Mensing residence, Connor and the rest of the group went to Evan's bedroom. Appellant was there along with a white male. Connor admitted that she told the police that as the males were talking about the shooting, somebody expressed disbelief to appellant that he had shot Santos. At trial, Connor could not remember exactly what had happened, but admitted that Norteños had threatened her about testifying. Connor did remember that appellant seemed more excited than disappointed and did not seem to care. According to Connor, appellant reenacted holding the gun. Connor admitted that she told the police that appellant was saying that he was there and that he "murdered" Santos.

Dr. Joseph O' Hara, a forensic pathologist, conducted the autopsy on Santos on October 3, 2005. He identified three entry wounds and two exit wounds. The bullets entered the body near Santos's belly button, under his right armpit and on the back of his right forearm. Two of the wounds, by themselves, would have been fatal.

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[7] We refer to Evan Mensing by his first name to distinguish him from his brother Alex Mensing. No disrespect is intended.

Dr. O' Hara did not find gunpowder or soot on the victim's clothing, which he opined demonstrated that the shots "were likely distant" or at least came from three feet away.

At the time of the shooting David Swing was a special operations sergeant in charge of investigations at the Morgan Hill Police Department. He investigated the Santos shooting. On October 1, 2005, a flyer was sent out with appellant's photo indicating that he was wanted for questioning. On the evening of October 2, 2005, appellant went to the Morgan Hill police station where Swing met him around 9:30 p.m. Appellant was sitting in an interview room by himself. Swing identified himself to appellant and told him that he was free to leave, but Swing did not have a conversation with appellant until about an hour later. Detective Beilmann was present during the conversation. At the time, appellant was wearing a red shirt and blue or black jeans.

A video recording of the interview was presented at trial and played for the jury. Swing explained that appellant's interview was recorded on two DVDs. The first 22 minutes or so of the second DVD contained video but not audio. Swing explained that the error occurred during a file transfer from the first DVD to the second.[8]

During the first part of the interview appellant told the officers that he was at the station because his mother told him the police needed to speak to him. He said that he was homeless and unemployed having chosen not to relocate with his mother when she moved.

Initially, appellant told the officers that he went to Tennant Station around 9 p.m. to go to the movie theater. When he got to the movie theater, there were "all kinds of cops." Appellant, along with his friends Alex and Tom left the area and went to Alex's house. Appellant denied any involvement in the shooting. The officers suggested that if appellant had been involved, and there had been a fight, that could be seen as self-

[8] Swing explained that a technician could not diagnose or replicate the error.

defense. When asked, "You don't know anything at all about . . . what happened," appellant stated, "No." The officers told appellant that someone had named him as the shooter and that there was gossip going around to this effect. Appellant responded, "that's gossip." Appellant denied being a Norteño or a being a member of a local Morgan Hill gang.

Later, appellant told the officers that if he had been involved he would be "halfway to Mexico." At one point, appellant became frustrated at the officers' insinuations that he knew more about what happened than he was telling the officers, appellant said that he was "done talking" and wanted a lawyer. However, appellant changed his mind and continued to talk. The officers asked appellant if he knew where the gun was located. Appellant told them that it was their job to find it.

Toward the end of the first part of the interview, the officers left the room. According to Swing, during the 22 minutes of silence, Beilmann was taking some photographs of appellant while he obtained a gunshot residue kit from the evidence supply room. Swing explained that as he opened the kit, appellant said, "I did it." Swing placed part of the kit on the table and again appellant said, "I did it." Thereafter, Swing asked Beilmann to return to the interview room with a *Miranda* form. At this point, the audio on the DVD resumed and the reading of the *Miranda* rights was preserved on the audio portion of the video recording.

After being advised of his *Miranda* rights, Swing asked appellant if he wanted to talk. Appellant said that the victim had a knife and tried to stab him. Appellant said that everyone who was with the victim had a knife. Thereafter, appellant explained that he had a gun in the waistband of his pants, a 357 Magnum revolver, because it was not the first time that people "ran up on" him. Appellant believed that he was attacked because he was wearing red. Appellant denied any gang involvement, but said that he used to talk to Norteños.

As to the whereabouts of the gun, appellant told the officers that initially he threw it away; then, he found it and destroyed it after the shooting. When the officers expressed interest in trying to find the weapon, appellant tried to broker a deal with them wherein if they revealed the identity of a snitch, appellant would reveal where the gun was located.

Gang Evidence

Morgan Hill Police Officer David Ray met appellant on January 26, 2005, at appellant's residence. Ray was investigating a report of a petty theft at a liquor store. Ray filled out a field identification card on which he noted that appellant was wearing a red and white baseball cap with no logo, a solid red T-shirt, and red and white shoes. According to Ray, appellant stated that he claimed Norte and was associated with, but was not a member of, Varrio Morgan Lomas (VML). Appellant said that he was "living the life of a northern soldier" and was "all flamed out" and showing his "pride." All flamed out referred to wearing gang colors.

During her tenure as a school resource officer, Morgan Hill Police Officer Melinda Zen had many contacts with gang members in the schools and learned who the major gang members were. Subsequent to her assignment as a school resource officer, Zen's patrol and investigative duties involved considerable exposure to gangs and gang related investigations. Zen testified as an expert on Hispanic criminal street gangs.

Zen explained that VML was a derivative street gang related to the umbrella organization of the Norteño prison gang. The Sureño prison gang, which derived from the Mexican Mafia, also had territorial gangs. Norteño gangs identify with the color red and the number 14, whereas Sureño gangs identify with the color blue and the number 13. Norteño gang members often had tattoos and shaved heads except for a ponytail on one side. Both groups sometimes wore belt buckles with their gang symbol.

Each gang has a "war cry." For Norteños, it is Norte or puro norte. Saying this to a Sureño would represent a challenge to fight. If a Norteño called a Sureño a "scrap," it

is considered by Sureños to be the ultimate insult. Typically, fights between the rival factions involved weapons on both sides.

Zen testified that the primary criminal activities of Norteño and Sureño gangs included homicide, attempted homicide, auto theft, carjacking, and tagging. The motive for these crimes is an intense rivalry between the gangs. VML's primary activities are the same as the typical Norteño gang. However, before the shooting incident near the Safeway store, gang altercations involved hand-to-hand combat with knives, bats, or sticks, but not gunfire. According to Zen, as applied to these gangs, the commission of an offense will earn respect in that it will instill fear in rivals and the community.

As to predicate offenses involving VML, Zen testified that Alfonso Haro was a self-admitted Norteño and VML gang member who was with appellant during the petty theft incident about which Officer Ray testified. In addition, Phillip Calvillo another admitted Norteño or VML gang member was convicted of vehicle theft committed between December 20, 2004, and January 16, 2005. A copy of a complaint, abstract of judgment, minute order and probation report relating to Haro's conviction of carjacking committed on January 25, 2005, and a complaint, minute order, and abstract of judgment relating to Calvillo's conviction were admitted into evidence. According to Zen, essentially, being a self-admitted Norteño and member of VML was the same thing.

While Zen was a school resource officer, she became aware of appellant when he attended Britton Middle School. Appellant would wear red, called Spanish-speaking students "scraps" and was involved in fights. On April 18, 2002, appellant and some friends followed two Spanish-speaking students, spit at them, called them "scraps" and tried to take a necklace from one of the students. During the 2002-2003 school year at Live Oak High School, Zen became aware of appellant as a major player among Norteño gang members. Appellant was a respected Norteño leader or shot caller on campus. If there was a problem with a Sureño, appellant was the "guy to go to."

Zen discussed other law enforcement contacts with appellant. On May 6, 2004, while wearing a red shirt over his shoulder, appellant was stabbed in a gang-related incident. Appellant approached an individual and called him a "fucking scrap." Appellant's wounds were defensive and mostly superficial. On February 10, 2005, another officer filled out a field identification card in which it was noted that appellant was wearing a red sweater. Appellant denied being a gang member generally and denied being a Norteño in particular. However, appellant told this officer that if something happened, he would "back VML as a Norteño gang."

With regard to Officer Ray's contact with appellant on January 6, 2005, Zen stated that appellant was wearing gang colors or "battle gear." Appellant's comments about "living the life of a northern soldier" referred to his willingness to further the cause of the gang. Zen explained that in her experience, it was typical for Norteños to deny gang affiliation while Sureños usually admitted gang membership. However, Norteños were more inclined to admit being a Norteño than a particular local gang such as VML. While appellant never admitted to Zen that he was a member of VML, he did claim to be a Norteño or northerner.

In order to determine if appellant was a Norteño gang member affiliated with VML, Zen contacted Officer Kirkland of the Santa Clara County Department of Corrections. Kirkland works in jail classification and his primary job is to identify gang members for the county jail. Kirkland told Zen that appellant had admitted that he was a Norteño gang member and a VML gang member. According to Kirkland, appellant participated in an exercise program that was mandatory for Norteño gang members in the county jail.

Based on appellant's admission to Officer Kirkland, information contained in field identification cards, the incident when appellant was stabbed, and incidents when appellant used the word "scrap," Zen opined that appellant was a Norteño gang member, and at the time of the shooting, appellant was a VML gang member. Zen explained that

the shooting benefited VML's reputation because VML gained respect in the gang community. Appellant's use of a handgun demonstrated to rival gangs that VML was prepared to kill a rival gang member. Following the shooting, there were two serious assaults on Sureños involving VML and Village Boy Norteño gang members in Morgan Hill. Both victims sustained serious injuries and the suspects had news clippings about the Safeway shooting incident in their rooms.

The Defense Case

Appellant testified in his own defense. He explained that he was 18 at the time of the incident. He stated that he had never been convicted of any offense as an adult or as a juvenile. He did not finish high school because he was "kicked out" of two schools. Appellant admitted to being a northerner from the time he was 14 years old. Although appellant knew VML members, and sometimes associated with them, he denied being a member. Similarly, he denied telling the jail classification officer that he was a member of VML. However, he admitted that he had been in fights with Sureños.

At the time of the incident, appellant had been homeless for two to three months because his mother and sister had moved to Modesto and he did not want to leave Morgan Hill. Appellant wanted to remain with his friends. Some of these friends were northerners or VML members. Appellant stayed mostly with friends.

On the night of September 30, appellant and three friends decided to go to the movies at Tennant Station. According to appellant, none of these friends were Norteños or members of VML. About three days before this incident, appellant's friend Evan Mensing had given appellant a gun to sell. Appellant explained that because he was homeless and had been attacked before, he felt safe with the gun and decided to keep it. He thought about carrying the gun in case he got into a fight with a Sureño. Appellant had the gun with him when he went to the movies. He knew the gun was loaded, but he never fired it before that night and did not know if it worked. Appellant acknowledged that a large caliber gun could do a lot of damage.

Appellant testified that he was wearing a red and black plaid shirt. He understood however, that by wearing red he was inviting a conflict with rival gangs. Although he had been in altercations with Sureños, he never carried a weapon.

Appellant explained that as he and his friends were walking toward the movie theater, he heard a noise behind him. He turned and saw a Sureño who was cursing at him. Appellant identified this person as Santos. Santos was about 15 feet away, dressed in blue and yelling "sur" and "chapete." Appellant considered this a challenge. Appellant moved five feet in the direction of Santos, as did other members of appellant's group. There were at least six individuals with Santos; all were armed with weapons. However, appellant never saw a stick. According to appellant, although Santos had a knife in his hand he was not afraid and he moved toward Santos. Appellant called Santos a "scrap" multiple times. He knew a confrontation would follow. Appellant admitted that he challenged Santos to fight and invited mutual combat, even though Santos was holding a knife by his side. Despite the challenge, Santos did not advance toward appellant.

As the "trash talking" continued, appellant and Santos focused on each other. They were about 10 feet apart. According to appellant, Santos held the knife above waist level, by his side, but never raised it or pointed it. At one point, however, Santos brought the knife up, said something in Spanish and moved toward appellant. Fearing that he was going to be stabbed or killed, appellant pulled the gun out from where it had been concealed in the waistband of his pants, and fired. Appellant did not remember aiming the gun, nor could he recall how many shots he fired. Appellant admitted that in order to discharge the rounds, he needed to pull the trigger each time. Although he stated that he did not aim the gun, appellant acknowledged that he understood the concept of a shooting pattern or grouping, which involved targeting the same area on the body while discharging multiple rounds. Having viewed the photographs of Santos, appellant conceded that there was a "pretty tight pattern."

Appellant explained that he expected to have a fistfight with Santos because typically one combatant tells the other to put the weapon down and "be a man." Nonetheless, appellant never told Santos to put down the knife. Nor did he display the gun in an attempt to get Santos to back down. Appellant admitted that if someone had displayed a gun to him in such a situation he would have run away.

After firing the gun, appellant saw Santos "just . . . standing there;" but then, he saw Santos back up and knew that he had been hit. Appellant turned around and ran. Appellant did not see what Santos did with the knife he was holding. Appellant ran toward Safeway, dropping the gun in the bushes along the way. He returned the next day, retrieved the gun and returned it to Evan Mensing.

After the shooting, according to appellant, he went to the Mensing residence. In the presence of several people he reenacted the shooting, but denied saying that he murdered Santos. Appellant explained the reenactment as trying to "be cool" and "just being stupid" because there were girls in the room.

Appellant learned that Santos had died when he went to the police station. Earlier in the day he had spoken to his mother and she told him to go to the police station. Appellant admitted that when he went to the police station he planned on lying about his involvement in the shooting. He thought that he could talk his way out of it. Appellant acknowledged the numerous lies he told the officers about his role in the shooting, where the gun was located and gang membership. Further, he admitted that lying to the police came easily to him and that he lies when it is to his benefit. Appellant agreed that the officers brought up the subject of self-defense, but when they did he continued to deny his involvement in the shooting. Appellant acknowledged that he was more interested in finding out who snitched on him than he was about helping the officers locate the gun.

Appellant affirmed that he chose the gang lifestyle. In a typical one-year period, appellant estimated that he would engage in about 20 fights with Sureños. He admitted his participation in the gang-related stabbing incident in May 2004; that he was a

northern soldier and proud of it; that a violent act against a Sureño enhanced the reputation of a Norteño; and if a Norteño shot and killed a Sureño, it made Sureños afraid of gunfire. Appellant testified that if a VML member was attacked, he would back him up with violence if necessary. Appellant admitted that he thought about carrying the gun around as a way to be safe in the event he was attacked or got into a fight with a Sureño.

Rebuttal Evidence

Deputy Paresa was recalled and testified that he never observed Santos move from a flat-footed position. Nor did he see Santos move his left or right hand forward. After the shooting, the deputy did not see anyone from the truck group pick up anything from the ground. After the pick-up started to leave the scene, Deputy Paresa followed it, but then returned to where Santos had been shot. The deputy looked around for casings and did not find a knife or any objects. However, he did not see the casing that was found later by other officers.

Discussion

Denial of Appellant's Suppression Motion

Appellant moved in limine for an order excluding his pretrial statements to police on the ground that the statements were the product of custodial interrogation conducted without *Miranda* advisements being given. The trial court conducted an Evidence Code section 402 hearing in which the court received evidence on the issue, including the testimony of David Swing, and two videodisks of appellant's interview, which the court reviewed. The court ruled that appellant had not been in custody at the time he admitted his involvement in the murder.

Appellant contends that the trial court erred in admitting his pretrial statements.

When reviewing the denial of a suppression motion, we are limited to evaluating the evidence presented at the suppression hearing. (*People v. Benites* (1992) 9 Cal.App.4th 309, 312; *People v. McKim* (1989) 214 Cal.App.3d 766, 768, fn. 1.) Accordingly, we set forth that evidence.

Swing testified at the Evidence Code 402 hearing that appellant's interview occurred two days after the shooting. At approximately, 9:30 p.m. appellant walked into the police station. Swing arrived at the police station around 10:30 p.m. and briefly met with appellant. Swing told appellant that he was free to leave and that if he wanted anything, or wanted to leave, he was to ask the officer who was standing in the hallway. Swing had to conduct another interview and so he did not meet with appellant again until about 30 minutes later at around 11 p.m.

Appellant was moved to a second interview room. Swing confirmed that appellant was there of his own free will and thanked him for his cooperation. He explained to appellant how to leave the building and how to exit the door whereupon appellant interrupted him and said that he would talk to the officers. At no time did Swing tell appellant that he was not free to leave. Appellant was not handcuffed or restrained in any way.

At one point, appellant stated that he thought Swing was accusing him of murder. Swing or Detective Beilmann, who was present during appellant's interview, told appellant that they were not accusing him of anything. They continued to talk and at one point appellant indicated he was confused, that he was "done talking" and wanted a lawyer. Swing testified that he did not call appellant a lawyer because at that point appellant was not under arrest. Thereafter, Swing confirmed that appellant wanted to continue talking.

Swing and Beilmann left the interview room for some time and then returned and continued the interview. When they returned, part of the audio portion of the interview was not present on the DVD. Swing recalled that the majority of the conversation during this time was either "anecdotal" conversation or not relevant to the interview.

Swing left the interview room to collect a gun shot residue kit. Shortly after he returned, appellant confessed to the murder. Swing called Beilmann to bring in a *Miranda* form. In Swing's mind the confession created enough probable cause to arrest

appellant and he was no longer free to leave. Therefore, Swing read appellant his *Miranda* rights. According to Swing, appellant understood his rights and agreed that he would talk to the officers.

At the end of the hearing, the court clarified that the sole issue before the court was whether appellant was in custody at the time of the interrogation.[9]

As noted, the court reviewed the entire recording of appellant's interrogation and ruled that appellant had not been in custody at the time he admitted his involvement in the murder.

A person must be advised of his or her rights under *Miranda* when subjected to "custodial interrogation." (*Miranda v. Arizona, supra,* 384 U.S. at p. 444; *People v. Mickey* (1991) 54 Cal.3d 612, 648 (*Mickey*).) In this context, "custodial" means any situation in which " 'a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' [Citation.]" (*Mickey, supra,* 54 Cal.3d at p. 648.) The test is whether a reasonable person in the defendant's position would feel that he or she was in custody -- that is, whether in light of all the circumstances of the interrogation, there was a " ' "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.' [Citation.]" (*People v. Stansbury* (1995) 9 Cal.4th 824, 830.)

Interrogation "refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301 [100 S.Ct. 1682], fns. omitted.)

"The question whether defendant was in custody for *Miranda* purposes is a mixed question of law and fact. [Citation.] 'Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and

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[9] The court found that the questioning constituted an interrogation

second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is . . . reconstructed, the court must apply an objective test to resolve "the ultimate inquiry": "[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." [Citations.] The first inquiry . . . is distinctly factual. . . . The second inquiry, however, calls for application of the controlling legal standard to historical facts. This ultimate determination . . . presents a "mixed question of law and fact" . . . .' [Citation.] Accordingly, we apply a deferential substantial evidence standard [citation] to the trial court's conclusions regarding ' "basic, primary, or historical facts: facts 'in the sense of recital of external events and the credibility of their narrators . . . .' " ' [Citation.] Having determined the propriety of the court's findings under that standard, we independently decide whether 'a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.' [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 401-402.)

Thus, in reviewing the trial court's ruling, "we accept [its] factual findings, based on its resolution of factual disputes, its choices among conflicting inferences, and its evaluations of witness credibility, provided that these findings are supported by substantial evidence." (*People v. Mayfield* (1997) 14 Cal.4th 668, 733.)

In *People v. Aguilera* (1996) 51 Cal.App.4th 1151, this court identified some of the circumstances relevant to an inquiry into whether there has been a custodial interrogation. "Among them are whether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom; whether there were

restrictions on the person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation. [Citations.]" (*Id*. at p. 1162.) However, "[n]o one factor is dispositive. Rather, we look at the interplay and combined effect of all the circumstances to determine whether on balance they created a coercive atmosphere such that a reasonable person would have experienced a restraint tantamount to an arrest. [Citation.]" (*Ibid*.)

After reviewing the DVDs and applying the factors here, we agree with the trial court that this was not a custodial interrogation. Appellant went to the police station on his own accord. Twice appellant was advised before the interview that he was free to leave if he so chose and was even shown where and how he could leave. The express purpose of the interview was to question appellant as a suspect, but there is no indication that Swing and Beilmann communicated this fact to appellant.

Appellant was not handcuffed or restrained in any way. Appellant's interruption of Swing's explanation of how to leave was not only an implicit indication of his desire to speak, but also of his understanding that he was free to leave.

In support of his assertion that he was in custody, appellant contends that the door to the interview room, which had been open, was closed at one point. A closed door is not necessarily indicative of a custodial situation. In *People v. Leonard* (2007) 40 Cal.4th 1370, the California Supreme Court held that there was no custodial interrogation where the interrogation of a young man with low intelligence and developmental disability was initiated by police, the defendant was fingerprinted before being questioned, the interrogation was relatively long (three and a half hours) and *it took place in small room with the door closed and with detectives sitting between defendant and the*

door, defendant was repeatedly told he was not under arrest and was free to end questioning at any time and leave. (*Id*. at p. 1400-1401.)

In total, appellant's interview was approximately one hour and 53 minutes before the *Miranda* advisements were given. There was nothing inherently coercive about the length of the interview. Certainly, some of the questions were focused on appellant's involvement in the shooting, but neither officer accused appellant of being the shooter. Rather, the officers indicated that they thought appellant knew more about what happened than he was telling them. However, focused and pointed questioning is not necessarily indicative of a custodial interrogation. "Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' It was that sort of coercive environment to which Miranda by its terms was made applicable, and to which it is limited." (*Oregon v. Mathiason* (1977) 429 U.S. 492, 495 [97 S.Ct. 711].)

Furthermore, there was nothing unduly coercive about the number of officers that questioned appellant. For most of the time Beilmann sat quietly making notes while only Swing did the questioning. Moreover, appellant's demeanor during the interview belies his claim that he did not feel free to leave.[10] Appellant's cavalier and flippant responses

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[10] For instance, when the officers suggested that they had videos of the shooting, appellant responded, "I'll watch 'em wich' 'ya." When the officers told appellant that there was talk on the street, he responded "that's gossip." When the officers said they had evidence he called someone on their cell phone afterward and admitted to the murder, appellant replied, "Well trace it, 'cause . . . I don't have any cell phone." When

to many of the officers' questions indicate that appellant was not feeling browbeaten or coerced. While appellant did express frustration that he was being accused of some involvement in the shooting, he did continue to talk. (Compare *United States v. Wauneka* (9th Cir.1985) 770 F.2d 1434, 1438-1439 [custodial interrogation where defendant was thrice transported by officers to investigators' office; on third occasion, he was placed in large conference room with four or five officers who each questioned him; questioning turned accusatory; questioning persisted despite fact defendant was visibly shaken and crying; defendant had no means of transportation and was never offered opportunity to leave the office prior to his confession].)

Appellant asserts that because he was homeless and the officers suggested that if he left the police station Sureños would likely kill him, and they made no offer to transport him to a safe location, a reasonable person would not have felt free to leave. We disagree. Here there was no hint that the officers would not allow appellant to leave if he so chose. (Compare *People v. Aguilera, supra,* 51 Cal.App.4th at p. 1163 ["we find it significant that [the detective] then explained that the interview would end and they would bring him home after he told them the truth"].)

In sum, the record supports the trial court's finding that a reasonable person in appellant's position would not have felt that he was in custody and restrained from leaving the interview at any time that he so wished. Accordingly, we conclude that the interview was not custodial interrogation for which *Miranda* advisements were required.

Relying on *Missouri v. Siebert* (2004) 542 U. S. 600 (124 S.Ct. 2601) (*Seibert*), appellant contends that his post-advisement statement was inadmissible.

In *Seibert,* a police officer questioned the defendant for about 40 minutes after her arrest, and she made incriminating statements. (*Seibert, supra,* 542 U.S. at pp. 604-605.)

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appellant perceived that he was the focus of the investigation, he told the officers, "Well if you guys think it's me, then arrest me right now, we'll go to court, 'cause it was not me."

After a break, the officer gave her *Miranda* warnings, and the defendant waived her rights. (*Id*. at p. 605.) Confronted with her prewarning statements, she confessed again. (*Ibid.*) The interrogating officer testified that he had made a " 'conscious decision' to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught," *i.e.,* to "question first, then give the warnings, and then repeat the question" until the suspect provides the answer he or she had " 'already provided once.' " (*Id.* at pp. 605-606.) The trial court suppressed the prewarning statements but admitted the postwarning confession. (*Id*. at p. 606.)

In *Seibert*, the United States Supreme Court was called upon to"test [this] police protocol for custodial interrogation that calls for giving no warnings of the rights to silence and counsel until interrogation has produced a confession. Although such a statement is generally inadmissible, since taken in violation of *Miranda* [citation], the interrogating officer follows it with *Miranda* warnings and then leads the suspect to cover the same ground a second time." (*Seibert*, *supra*, 542 U.S. at p. 604 (plur. opn. of Souter, J.).) The question before the court was the admissibility of the repeated statement. (*Ibid.*) The Supreme Court held that "[b]ecause this midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with *Miranda's* constitutional requirement, that a statement repeated after a warning in such circumstances is inadmissible." (*Ibid*.)

In his concurring opinion, Justice Kennedy noted that the interrogation technique at issue was a two-step one that was based on a deliberate violation of, and designed to circumvent, *Miranda.* (*Seibert, supra,* 542 U.S. at pp. 618, 620 (conc. opn. of Kennedy, J.).) In Justice Kennedy's view, the holding in *Seibert*--that whenever a two-stage interview occurs, admissibility of the postwarning statement should depend on whether the *Miranda* warnings, delivered midstream, could have been effective enough to accomplish their object, given the specific facts of the case (*id. at p. 615* (plur. opn. of Souter, J.))--was overly broad. Instead, Justice Kennedy believed that the reasoning and

result in *Oregon v. Elstad* (1975) 470 U.S. 298 (105 S.Ct. 1285) (*Elstad*) should continue to apply except where a deliberate two-step strategy was employed. (*Seibert, supra,* at p. 622 (conc. opn. of Kennedy, J.).)

In *Elstad,* the suspect made an incriminating statement at his home. He was not given *Miranda* warnings first, apparently because it was unclear whether he was in custody at the time. He was taken to the station house and given a proper warning, and, after waiving his rights, made a second statement that he later sought to suppress. The United States Supreme Court held that, despite the initial *Miranda* violation that rendered the first statement inadmissible, the postwarning statement could be introduced against the defendant because "neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression," given the facts of the case. (*Elstad, supra,* 470 U.S. at p. 308.)

Finding "it would be extravagant to treat the presence of one statement that cannot be admitted under *Miranda* as sufficient reason to prohibit subsequent statements preceded by a proper warning" (*Seibert, supra,* 542 U.S. at p. 620 (conc. opn. of Kennedy, J.)), Justice Kennedy concluded: "The admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed. If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver." (*Seibert, supra, at p. 622* (conc. opn. of Kennedy, J.).)

The Ninth Circuit Court of Appeal has held that, in light of Justice Kennedy's concurrence, "[t]his narrower test--that excludes confessions made after a deliberate, objectively ineffective mid-stream warning-- represents *Seibert's* holding. In situations where the two-step strategy was not deliberately employed, *Elstad* continues to govern

the admissibility of postwarning statements. [Citations.]" (*United States v. Williams* (9th Cir. 2006) 435 F.3d 1148, 1158.)

In this court's view, neither *Seibert* nor *Elstad* applies here because there was no *Miranda* violation—inadvertent or intentional—with respect to the first part of the interview. As we have already discussed, that interview did not constitute a custodial interrogation within the meaning of *Miranda*. As such, *Miranda* warnings were not required and the failure to give them did not constitute a violation of *Miranda.*

Sufficiency of the Evidence of Deliberation and Premeditation

Appellant contends that there was insufficient evidence to support a finding of premeditated and deliberate murder. Accordingly, he argues that this court should reverse his conviction for first degree murder.

After the prosecution rested its case, appellant moved under section 1118.1 for judgment of acquittal as to the entire case, but "More specifically to first degree murder."

The court asked the prosecutor to elaborate on his theory of first degree murder. In short, the prosecutor argued that appellant's gang lifestyle, which predated the shooting, combined with his conduct on the night in question, demonstrated that he considered using the gun in an altercation with a Sureño before the shooting. Defense counsel submitted the matter. The court denied the motion finding that there was "sufficient evidence to sustain a verdict on appeal."

"To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128.)

Implicit in appellant's argument is his contention that the trial court erred in denying his section 1118.1 motion.

Section 1118.1 requires the trial court in a jury trial on its own motion or the motion of the defense to acquit the defendant if at the close of the case of either party the evidence is insufficient to sustain a conviction on appeal. When an appellate court reviews the denial of a motion to acquit for insufficient evidence made at the close of the prosecution's case, we consider only the evidence then in the record. (*People v. Belton* (1979) 23 Cal.3d 516, 526-527.)

Relevant here, section 189 provides, "All murder which is perpetrated . . . by any . . . kind of willful, deliberate, and premeditated killing, . . . is murder of the first degree."

Thus, "A murder that is premeditated and deliberate is murder of the first degree. [Citation.] 'In this context, "premeditated" means "considered beforehand," and "deliberate" means "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." ' [Citation] 'An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.' [Citation.]" (*People v. Jurado* (2006) 38 Cal.4th 72, 118.)

In general, there are three factors present in cases involving premeditation: planning, motive, and the manner of killing. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1081.) However, while these factors are helpful for purposes of review, they " 'are not a sine qua non to finding first degree premeditated murder, nor are they exclusive.' [Citation.]" (*Ibid.*)

"Premeditation and deliberation are not to be confused with a deliberate intent to kill. Premeditation and deliberation require 'substantially more reflection; i.e., more understanding and comprehension of the character of the act than the mere amount of thought necessary to form the intention to kill.' [Citation.] It is therefore 'obvious that the mere intent to kill is not the equivalent of a deliberate and premeditated intent to kill.' [Citation.] Consequently, an intentional killing is not first degree murder unless the intent to kill was formed upon a preexisting reflection and was the subject of actual

deliberation and forethought. [Citation.]" (*People v. Van Ronk* (1985) 171 Cal.App.3d 818, 822-823.)

Nevertheless, "[p]remeditation and deliberation can occur in a brief interval. 'The test is not time, but reflection. "Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly." ' [Citation.]" (*People v. Memro* (1995) 11 Cal.4th 786, 863.)

In the context of a gang shooting, premeditation can be established even though the time between the sighting of the victim and the actual shooting is very brief. (*People v. Rand* (1995) 37 Cal.App.4th 999, 1001-1002.) "A studied hatred and enmity, including a preplanned, purposeful resolve to shoot anyone in a certain neighborhood wearing a certain color, evidences the most cold-blooded, most calculated, most culpable, kind of premeditation and deliberation." (*Id.* at p. 1001.)

Our review of the record as of the close of the prosecution's case-in-chief discloses evidence of planning, motive and a deliberate manner of killing. During his interview at the police station, appellant told the police that he had the gun in the waistband of his pants when he went to Tennant Station on the night of September 30. Appellant admitted that he carried the gun because of previous altercations with rival gang members. Before heading out that night appellant put on a red shirt, something he knew would cause Sureño gang members to recognize him as a Norteño. Zen confirmed that wearing gang colors was the equivalent of "battle gear." Furthermore, Zen's testimony established that committing a violent act, including killing a rival gang member, enhanced the reputation of a gang. A reasonable inference to be drawn from this testimony is that a gang member who arms himself/herself with a gun and goes out in "battle gear," has planned to use the gun in an altercation with a rival gang member.

As to evidence of motive, despite the fact that this was the first gang incident involving gunfire in Morgan Hill, appellant and Santos were rival gang members and

there was evidence that the rival gang members had fought before. In fact, appellant had been stabbed in a gang fight after he called a rival gang member a "fucking scrap."

As to evidence of the manner of the killing, firing a gun at close range where there is no evidence of a struggle, as in this case, has generally been found sufficient to support a finding of an intent to kill and premeditation and deliberation. (See e.g. *People v. Marks* (2003) 31 Cal.4th 197, 230.) Although appellant fired the gun from a maximum of 10 feet away, the relatively tight wound pattern, and the fact that appellant fired the gun four to five times supports an inference of deliberation.

A review of the entire record shows additional evidence of planning and motive from which a rational jury could find beyond a reasonable doubt that appellant committed a premeditated and deliberate murder. Appellant testified that he thought about carrying the gun around as a way of making himself safer in the event he was attacked or got into a fight with a Sureño. Appellant thought about using the gun in these situations. Further, the jury could reasonably infer from the evidence that appellant was proud of his life as a northern soldier and his admission that a violent act against a rival gang member would enhance the reputation of the Norteños, that the motive for the shooting involved gang rivalry.

Whether viewed at the end of the prosecution case, or the end of the presentation of all the evidence, there was sufficient evidence of premeditation and deliberation.

Sufficiency of the Gang Evidence

Appellant contends that the evidence was constitutionally insufficient to support the jury's finding that VML was a criminal street gang.

Specifically, appellant argues that the evidence that Haro and Calvillo were VML gang members was insufficient and thus the evidence of predicate offenses was insufficient.

"[T]o subject a defendant to the penal consequences of [a gang enhancement], the prosecution must prove that the crime for which the defendant was convicted had been

'committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.' (§ 186.22, subd. (b)(1) and former subd. (c).) In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a 'pattern of criminal gang activity' by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called 'predicate offenses') during the statutorily defined period. (§ 186.22, subds.(e) and (f).)" (*People v. Gardeley* (1996) 14 Cal.4th 605, 616-617.)

Appellant argues that the only evidence offered to prove that Haro and Calvillo were VML gang members was Zen's testimony.

As with substantive offenses, the same substantial evidence standard applies when determining whether the evidence is sufficient to sustain a jury's finding on a gang enhancement. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1456-1457; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 321-322.) The trier of fact may rely upon expert testimony about gang culture and habits to reach a finding on the gang allegation. (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 322, [the prosecution may rely on expert testimony to establish the required elements of the gang enhancement].)[11]

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[11] Although appellant appears to invoke the standard of review applicable to a trial court's ruling on a motion brought pursuant to section 1181.1, appellant did not press for a ruling on the ground that the gang testimony was insufficient when he brought his 1181.1 motion. Appellant's motion was directed specifically to the issue of premeditation and deliberation for first degree murder. For this reason, we consider the entire evidence presented to the jury.

Expert testimony is admissible to address the definition of a criminal street gang, the requisite primary activities and predicate offenses, and the gang's past criminal conduct and ongoing criminal nature. (*People v. Gardeley*, *supra*, 14 Cal.4th at pp. 617-620; *People v. Duran*, *supra*, 97 Cal.App.4th at p. 1463.) In addition, an expert's testimony is admissible about the existence, size, or composition of a gang; an individual's membership in, or association with, a gang; the primary activities of a specific gang; the motivation for a particular crime; whether and how a crime was committed to benefit or promote a gang; rivalries between gangs; gang-related tattoos; and gang colors or attire. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 657.)

Appellant takes issue with the fact that Zen claimed no more than a familiarity with Haro, but the nature and basis of that familiarity were not disclosed. Neither the records offered to prove Haro's and Calvillo's prior convictions contained any allegations of, or reference to gang membership. Accordingly, appellant argues that the jury was presented with no more than Zen's bare assertions that Haro and Calvillo were VML members.

Appellant contends the evidence was no better than that rejected in *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, *In re Leland D.* (1990) 223 Cal.App.3d 251, and *In re Alexander L.* (2007) 149 Cal.App.4th 605.

In *In re Nathaniel C.*, *supra*, 228 Cal.App.3d 990, the court found the expert's testimony insufficient where "[t]he [expert] learned about the . . . assault from talking with San Bruno police officers. . . . The incident involved the shooting of a person the San Bruno police believed to be a member of the [gang], according to the [expert]. The [expert] said the San Bruno police believed the person that did the shooting also was a [gang] member, and that the shooting was gang-related." (*Id.* at p. 998.) The court concluded the expert "offered only nonspecific hearsay of a suspected shooting of one [gang] member by another. The [expert] witness, a South San Francisco police officer, had no personal knowledge of the incident and only repeated what San Bruno police told

him they believed about the shooting. Such vague, secondhand testimony cannot constitute substantial evidence that the required predicate offense by a gang member occurred." (*Id.* at p. 1003.)

In *In re Leland D., supra,* 223 Cal.App.3d 251, the court held that the expert testimony was insufficient to prove a gang enhancement because the expert did not provide any details of the crimes he attributed to the gang and based his opinion solely on "hearsay statements from unidentified gang members and information pertaining to arrests of purported gang members . . . ." (*Id.* at p. 259.) The expert's testimony was the only evidence offered to prove the gang enhancement, and the evidence did not specify exactly who, when, where and under what circumstances gang crimes were committed. Since this testimony provided no more than conclusory and general pronouncements about the gang's primary purpose of committing "gang crimes," the appellate court found the expert's testimony insufficient as a matter of law to prove the gang enhancement. (*Id.* at pp. 259-260.)

In *In re Alexander L., supra,* 149 Cal.App.4th 605, the court held the gang expert's testimony lacked foundation and was insufficient to support the primary activities element. The officer testified only to general offenses committed by the gang, and to a predicate offense in which the alleged gang member was actually acquitted of the gang allegation. (*Id.* at pp. 611-612.) A second predicate offense involved a gang member involved in an assault, but no direct link was made as to how the offense was connected to the gang. (*Id.* at pp. 612-613.) More importantly, the officer's testimony concerning the predicate offenses did not have an adequate foundation. The officer did not explain how he knew about the offenses. (*Id.* at p. 612.) On cross-examination, the officer conceded that the vast majority of cases relating to the gang involved graffiti, but failed to specify whether the incidents involved misdemeanor or felony vandalism. (*Ibid.*)

As explained in *People v. Martinez* (2008) 158 Cal.App.4th 1324, the gang expert in *Alexander L.* "never specifically testified about the primary activities of the gang. He

merely stated 'he "kn[e]w" that the gang had been involved in certain crimes. . . . He did not directly testify that criminal activities constituted [the gang's] primary activities.' [Citation.]" (*Id*. at p. 1330.)

Unlike the expert witness in *In re Nathaniel C.,* Zen had personal knowledge that Haro and Calvillo were members of VML.

In essence, appellant is arguing that Zen's testimony that Haro and Calvillo were VML members lacked foundation. We point out that "[a] verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and *so stated as to make clear the specific ground of the objection or motion* . . . ." (Evid. Code, § 353, italics added.) In accordance with this statute, the California Supreme Court has held that the "defendant's failure to make a timely and specific objection" on the ground asserted on appeal makes that ground not cognizable. (*People v. Seijas* (2005) 36 Cal.4th 291, 302.)

Unlike in *In re Alexander L.*, the defense never objected to Zen's testimony that Haro and Calvillo were VML members on foundation grounds. (*In re Alexander L., supra*, 149 Cal.App.4th at p. 612, fn. 4 [court improperly overruled defense counsel's objection on foundation grounds].)

Here, unlike in *In re Leland D., supra*, 223 Cal.App.3d 251, Haro's and Calvillo's actual convictions for the enumerated offenses within the requisite timeframe were established by certified copies of the convictions themselves. Thus, with respect to the predicate act element of the gang enhancement, the only question remaining was whether Haro and Calvillo were members of VML. Zen testified that Haro was a self-admitted Norteño and VML gang member as was Calvillo. The record strongly supports the inference that Zen's knowledge came from her prior experience as a school resource

officer, her subsequent experience as a patrol officer as well as information gleaned from reports and field identification cards compiled by other officers.

Information describing the perpetrators and the facts underlying the offenses would have been readily available in the contents of the police reports, and either side was free to inquire further as to the basis of Zen's knowledge concerning gang membership of the perpetrators of the predicate offenses. That neither side availed itself of that opportunity does not render Zen's testimony incompetent or insufficient.

Cruel and Unusual Punishment

Appellant contends that his sentence of two consecutive 25 years to life terms constitutes cruel and/or unusual punishment in violation of both the state and federal Constitutions. For this reason, he asks this court to reduce his conviction or remand for resentencing.

Prior to sentencing, appellant moved the court to reduce his conviction to second degree murder or manslaughter pursuant to *People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*) and *In re Lynch* (1972) 8 Cal.3d 410 (*Lynch*). Appellant asserted that a sentence of 50 years to life would constitute cruel and unusual punishment under the state Constitution. The court denied the motion.

Since, arguably, the California Constitution's prohibition against cruel or unusual punishment is broader than the United States Constitution's prohibition against cruel and unusual punishment, we analyze appellant's contention under the California standard only. A punishment that satisfies this standard necessarily also satisfies the federal standard. (Cf. *People v. Anderson* (1972) 6 Cal.3d 628, 634, superseded by Cal. Const., art. I, § 27 on other grounds.)

In California, a defendant must overcome a considerable burden when challenging a penalty as cruel or unusual. (*People v. Wingo* (1975) 14 Cal.3d 169, 174; *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630.) Since it is the Legislature that defines crime and determines punishment, courts must defer to legislative authority unless the statute

appears " 'clearly, positively, and unmistakably' " unconstitutional. (*People v. Wingo, supra,* 14 Cal.3d at p. 174.) Even so, "a statutory punishment may violate the constitutional prohibition not only if it is inflicted by a cruel or unusual method, but also if it is grossly disproportionate to the offense for which it is imposed." (*Dillon, supra,* 34 Cal.3d at p. 478, fn. omitted.)

A defendant bears the burden of establishing that the punishment imposed for his offense is unconstitutional. (*People v. King* (1993) 16 Cal.App.4th 567, 572.)

Citing *Lynch, supra,* 8 Cal.3d 410, 425-429, the California Supreme Court has "identified three techniques used by the courts to focus the inquiry: (1) an examination of 'the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society'; (2) a comparison of the challenged penalty with those imposed in the same jurisdiction for more serious crimes; and (3) a comparison of the challenged penalty with those imposed for the same offense in different jurisdictions." (*In re Reed* (1983) 33 Cal.3d 914, 923 (overruled on other grounds by *In re Alva* (2004) 33 Cal.4th 254.) A penalty need not be disproportionate in all three areas to be cruel or unusual. (*Dillon, supra,* 34 Cal.3d 441, 487, fn. 38.)

Thus, "even if factors 2 and 3 of the *Lynch* test favor a finding of disproportionality, we must examine the nature of the offense and the offender and set aside the [penalty] only if it is 'so "disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." [Citation.]' [Citation.]" (*People v. King, supra,* 16 Cal.App.4th at p. 574.)

As to the first factor, courts must consider the "totality of the circumstances" surrounding the commission of the crime, including "such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts." (*Dillon, supra,* 34 Cal.3d at p. 479.)

Appellant compares himself to the defendant in *Dillon*. He points out that he was only 18 at the time he committed the offense, he had no juvenile record and no serious criminal history.

In *Dillon,* the 17-year-old defendant was convicted of first degree felony murder and attempted robbery. (*Dillon, supra*, 34 Cal.3d at pp. 450, 451.) The defendant and his friends had attempted to take marijuana from a field. (*Id.* at p. 451.) The defendant rapidly fired his rifle when he heard someone coming towards him and saw that the person was carrying a shotgun. (*Id.* at p. 452.) The Supreme Court found a sentence of life imprisonment without the possibility of parole constituted cruel or unusual punishment. The high court reasoned (1) that the trial court and jury gave credence to the defendant's testimony that he feared for his life and panicked (*id.* at p. 482); an expert testified that the defendant was immature and reacted as a much younger child (*id.* at p. 483); (3) the jury inquired whether it could convict the defendant of second degree murder or manslaughter even if it found that the killing occurred during a robbery (*id.* at p. 484); (4) "after hearing all the testimony and diligently evaluating defendant's history and character, both the judge and the jury manifestly believed that a sentence of life imprisonment as a first degree murderer was excessive in relation to defendant's true culpability . . . " (*id.* at p. 487); and (5) the defendant "had no prior trouble with the law, and . . . was not the prototype of a hardened criminal who poses a grave threat to society." (*Id.* at p. 488.)

Appellant is not similarly positioned to the defendant in *Dillon.* Appellant was convicted of first degree murder based on premeditation and deliberation, a crime distinguished from felony murder in *Dillon,* and the jury found true the fact that appellant's crime was committed for the benefit of a gang. (*People v. Guinn* (1994) 28 Cal.App.4th 1130, 1146 [finding that the appellant who had embraced a gang lifestyle was "not comparable to the immature, previously nonoffending, teenager in *Dillon*"].)

Further, unlike in *Dillon*, neither the court nor the jury suggested that the sentence was excessive in light of appellant's culpability.

When we consider the nature of the offense and the offender in this case, we conclude that appellant's sentence neither shocks the conscience nor is disproportionate to the crime. Appellant was a self-avowed Norteño gang member who was thoroughly embedded in the gang culture of Morgan Hill. He identified as a Norteño as early as middle school. As appellant moved into high school he became a major player among Norteños. By appellant's own estimation he averaged 20 gang fights a year.

Moreover, appellant showed no remorse for Santos's murder, nor did he accept responsibility for his conduct, blaming Santos for making him commit murder. Furthermore, with apparent pride and satisfaction, appellant reenacted the murder and confirmed for his friends that he murdered a rival gang member. Appellant's unrepentant attitude was apparent during his statement to the police; he taunted them to do their job and find the murder weapon. Appellant even tried to broker a deal with the officers so that he could ascertain the identity of the person who had snitched.

When we consider the nature of the offense, we conclude that this was a violent, senseless and tragic event. Appellant set out for Tennant Station dressed in red, with a gun concealed in the waistband of his pants. To the extent that the Sureños initiated the confrontation, the evidence showed that Santos was unarmed and posed no threat to appellant when appellant targeted him (as evidenced by the tight wound pattern) and pulled the trigger four or five times.

Finally, as the trial court observed, there was nothing remotely naïve about appellant's conduct. Accordingly, we reject appellant's challenge to his sentence as cruel or unusual punishment.

Instructional Error

Appellant argues that the trial court erred in instructing the jury on first degree premeditated murder because the information charged appellant with only second degree murder in violation of section 187.

If this was truly a claim of instructional error, we would find that appellant has forfeited this issue because he failed to object to the instruction below. Generally, a party forfeits any challenge to a jury instruction that was correct in law and responsive to the evidence if the party fails to object in the trial court. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.)

Nevertheless, appellant's claim is actually one concerning what he perceives as a due process violation.

Appellant argues that because the information charged only the crime of murder in violation of section 187, the trial court lacked jurisdiction to proceed to try him for first degree premeditated and deliberate murder.

Appellant concedes that the California Supreme Court has held that a defendant may be convicted of first degree murder even though the indictment or information charged only murder with malice in violation of section 187. However, he argues that the federal Constitution now requires more specific pleading. Citing *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476 (120 S.Ct. 2348), appellant argues that under the notice and jury trial guarantees of the Sixth Amendment and the due process clause of the Fourteenth Amendment "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.' " Since the facts necessary to make a killing murder in the first degree (a willful, deliberate, and premeditated killing) are facts that increase the maximum penalty for the crime of murder, ergo, they should have been charged in the information.

To the extent that appellant claims he received inadequate notice of the prosecution's theory of the case, the California Supreme Court has explained that "generally the accused will receive adequate notice of the prosecution's theory of the case from the testimony presented at the preliminary hearing or at the indictment proceedings." (*People v. Diaz* (1992) 3 Cal.4th 495, 557.) Furthermore, the record belies appellant's claim that he had inadequate notice. Appellant knew the prosecution was seeking a first degree murder conviction since defense counsel moved for acquittal of first degree murder.

In any event because appellant did not move to reopen the case when he learned later that the court would instruct the jury on first degree premeditated and deliberate murder, his claim of insufficient notice is not preserved for appellate review. (*People v. Memro*, *supra*, 11 Cal.4th at p. 869.)

Custody Credits

Appellant's final claim is that he is entitled to two additional days of custody credits. Respondent concedes the issue. Our review shows that appellant is correct.

Appellant was arrested on October 3, 2005 and sentenced on January 18, 2008. Including the day of arrest and the day of sentencing, appellant is entitled to 838 days of actual presentence credit.[12] The abstract of judgment reflects that the trial court awarded appellant only 836 days of presentence credit.

Section 2900.5 states, "In all felony . . . convictions . . . when the defendant has been in custody, including . . . any time spent in a jail . . . all days of custody of the defendant . . . shall be credited upon his . . .term of imprisonment . . . ." A sentencing court must grant a defendant custody credits both for the day of arrest and the day of sentencing. (*People v. Browning* (1991) 233 Cal.App.3d 1410, 1412 [credit for day of

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[12] Pursuant to section 2933.2 appellant's custody credits are limited to actual days in custody. No conduct credits are permissible.

arrest]; *People v. Smith* (1989) 211 Cal.App.3d 523, 526-527 [credit for day of sentencing].) This is so even where one or both days are just a fraction of a day. (*People v. Scroggins* (1987) 191 Cal.App.3d 502, 508.)

A failure to award custody credits accurately results in an unauthorized sentence, subject to correction at any time. (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.) We remind counsel, however that section 1237.1 provides that a request for correction of presentence custody credits should first be presented to the trial court. It does not appear from the record that this was done.

We point out that in order to fulfill the jurisdictional purposes of Penal Code section 1237.1 and to ensure an orderly process and protect the interests of defendants, the People must have notice of a defendant's request and, for appellate purposes, the trial court must have issued an order denying the request. Nevertheless, *People v. Acosta* (1996) 48 Cal.App.4th 411 held that section 1237.1 permits an appellate court to consider a credits issue joined with another issue. (*Id*. at p. 420.) We agree that where multiple issues are presented on appeal, as in this case, we may resolve a presentence credit issue for the sake of judicial economy.

Disposition

The judgment is modified to reflect an award of 838 days credit for time served. As so modified, the judgment is affirmed. The Clerk of the Court is directed to forward a certified copy of the amended abstract of judgment to the Department of Corrections.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.